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Raub Oil Mill Sdn Bhd v Dato' Sri Andrew Kam Tai Yeow

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HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-500–12 OF 2017
ONG CHEE KWAN JC
10 JUNE 2019

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Civil Procedure — Action — Discontinuance of — Application for discontinuance of action with leave — Matters to consider in granting discontinuance of action — Whether application to discontinue action was bona fide — Whether plaintiff dominus litis — Whether application to discontinue action ought to be allowed — Rules of Court 2012 O 21 r 3(1)

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This was an application under O 21 r 3(1) of the Rules of Court 2012 ('the ROC') for discontinuance of action with leave. The application was filed by the plaintiff citing the non-joinder of parties as the reason for the application, in which more time was required to trace the ultimate recipients of a sum of monies which was the subject matter of the main suit. The plaintiff contended

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that the present action was still at a preliminary stage and that the defendant had not gained any interim or interlocutory advantage between the issuance of writ and the filing of this application. The defendant disputed the bona fide of the discontinuance application, and that if there was indeed a non-joinder of parties, the plaintiff could easily file an application to amend the writ to include

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the relevant recipients. The defendant further submitted that following the dismissal of the summary judgement application, the defendant was now *dominus litis* in the action and that if the court were to permit the discontinuance application, it ought to be done that the plaintiff not be given liberty to file afresh.

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Held, allowing the plaintiff's application to discontinue the action without liberty to file afresh and RM20,000 in costs:

(1) In the present action, the plaintiff was, in fact, seeking time to improve its claims and to gather further evidence to overcome the inadequacies that the defendant had successfully exposed when resisting the plaintiff's summary judgement. Given the aforesaid, the bona fide of the discontinuance application was questionable (see paras 40 & 42).

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(2) The defendant had demonstrated that the plaintiff was no longer wholly *dominus litis*. In the plaintiff's summary judgment application, the defendant had shown that he had a good response to each of the plaintiff's allegations. The defendant being the *dominus litis* was entitled to insist on proceeding with the action, given the pleadings had closed and the documents necessary for the trial save for the witnesses'

statements had been filed in court (see paras 44 & 46).

(3) The court would not compel a litigant to press on with his action against his will. However, it would be prejudicial to the defendant if the plaintiff was to be permitted to discontinue the action with liberty to file afresh. The advantage that the defendant had gained would be taken away from him if the plaintiff was given a life line to overcome the deficiencies in its claims. In the premises and on the exceptional grounds stated above, the court exercised its discretion to grant the plaintiff's application for leave to discontinue this action but on terms that no fresh action shall be brought on the same cause of action against the defendant based on the same or substantially the same facts in this action (see paras 63 & 65–66).

[Bahasa Malaysia summary

Ini merupakan satu permohonan dibawah A 21 k 3(1) Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk pemberhentian tindakan dengan izin. Permohonan ini difailkan oleh plaintif merujuk kepada ketiadaan pencantuman pihak sebagai alasan kepada permohonan, yang mana masa lanjut diperlukan untuk mengesan penerima terakhir jumlah wang yang merupakan hal perkara guaman utama. Plaintif menegaskan bahawa bahawa tindakan ini masih di peringkat awal dan defendan tidak mendapat apa-apa manfaat interim atau interlukotori di antara pengeluaran writ dan pemfailan permohonan ini. Defendan mencabar bona fide permohonan pemberhentian, dan bahawa sekiranya benar tiada pencantuman pihak-pihak, plaintif boleh memfailkan permohonan untuk meminda writ untuk menambah penerima yang relevan. Defendan juga menghujahkan bahawa selepas pengetepian permohonan penghakiman terus, defendan merupakan *dominus litis* dalam tindakan dan sekiranya mahkamah membenarkan permohonan pemberhentian, ianya hendaklah dibuat tanpa membenarkan plaintif kebebasan untuk memfailkan semula.

Diputuskan, membenarkan permohonan plaintif untuk memberhentikan tindakan tanpa kebebasan untuk memfailkan semula dan RM20,000 kos:

(1) Dalam tindakan ini, plaintif sebenarnya cuba untuk mendapatkan masa untuk memperbaiki tuntutannya dan untuk mendapatkan keterangan lanjut untuk menangani kekurangan yang defendan telah berjaya untuk mendedahkan semasa menentang penghakiman terus plaintif. Mengambil kira perkara tersebut, adalah dipersoalkan sama ada permohonan pemberhentian adalah bona fide (lihat perenggan 40 & 42).

(2) Defendan telah memnunjukan bahawa defendan bukan lagi *dominus litis* sepenuhnya. Dalam permohonan penghakiman terus plaintif, defendan telah menunjukan bahawa dia mempunyai jawapan yang baik kepada setiap satu alegasi plaintif. Defendan yang merupakan *dominus litis* berhak untuk bertegas akan prosiding dan tindakan, mengambil kira

pliding telah ditutup dan dokumen yang diperlukan untuk perbicaraan kecuali penyataan saksi telah difailkan di mahkamah (lihat perenggan 44 & 46).

(3) Mahkamah tidak akan memaksa seorang litigan untuk meneruskan tindakan tanpa kerelaannya. Namun, ianya akan memprejudiskan defendan sekiranya plaintif dibenarkan untuk memberhentikan tindakan dengan kebebasan untuk memfailkan semula. Manfaat yang defendan telah peroleh akan ditarik balik darinya sekiranya plaintif diberikan talian hayat untuk menangani kekurangan dalam tuntutannya. Berdasarkan premis ini dan alasan luar biasa yang dinyatakan di atas, mahkamah menggunakan budi bicaranya untuk membenarkan permohonan plaintif untuk memberhentikan tindakan ini dan atas syarat bahawa tiada tindakan baru akan di mulakan atas kausa tindakan yang sama terhadap defendan berdasarkan fakta yang sama atau kebanyakannya sama dalam tindakan ini (lihat perenggan 63 & 65–66).]

Notes

For cases on discontinuance of action, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 143–155.

Cases referred to

Newlake Development Sdn Bhd v Zenith Delight Sdn Bhd [2017] MLJU 671, CA (refd)
Ng Hee Thong & Anor v Public Bank Bhd [2000] 2 MLJ 29, CA (refd)
Overseas Union Finance Ltd v Lim Joo Chong [1971] 2 MLJ 124 (refd)
Sigma Glove Industries Sdn Bhd & Ors v Ong Chin Kok & Anor [2018] 8 MLJ 481, HC (refd)

Legislation referred to

Moneylenders Ordinance 1951 s 16
National Land Code Forms 16D, 16E
Rules of Court 2012 O 21 rr 2(4), 3(1)
Trustee Ordinance 1949

Ong Chee Kwan JC:

INTRODUCTION

[1] An application under O 21 r 3(1) of the Rules of Court 2012 ('the Rules') for discontinuance of action with leave involves the exercise of discretion by the court.

[2] This decision deals with the exercise of the court's discretion to grant a discontinuance *without* liberty to file afresh.

BACKGROUND

[3] The plaintiff is a private company limited by shares and operates as a palm oil mill and runs the business of processing and producing palm oil kernels in Raub, Pahang.

[4] The defendant is a director of the plaintiff.

[5] The plaintiff filed this action against the defendant on 11 December 2017 claiming that the defendant had caused a sum of RM7m to be remitted by the plaintiff either directly or through its related companies to the defendant to be used as part payment for the acquisition of 30,000 acres of agricultural land from the Pahang State Government. The RM7m is said to have been remitted to the defendant in the years 2013–2014.

[6] The plaintiff said the defendant failed to utilise the RM7m for the said purpose. The plaintiff claimed the defendant breached his fiduciary obligations and that the defendant holds the RM7m as constructive trustee for the plaintiff. Alternatively, the plaintiff claimed it is entitled to restitution of the RM7m from the defendant.

[7] The defendant denied a sum of RM7m was remitted to him for the alleged purpose. He further denied the purchase of any such agricultural land by the plaintiff as alleged. Indeed, particulars of the alleged agricultural land were not produced.

[8] The defendant maintained that the action was commenced by the plaintiff in bad faith and for the collateral purpose of putting pressure on the defendant in response to a suit filed on 5 September 2017 by the defendant against his father, Tan Sri Dato' Kam Woon Wah in the Kuala Lumpur Court Suit No WA-22NCC-352–09 of 2017 ('the main suit').

[9] In the main suit, the defendant seeks, *inter alia*, to enforce a written shareholders' agreement dated 16 January 2017 and to restrain his removal as director of the plaintiff, one Raub Mining & Development Company Sdn Bhd ('RMDC') (which is a company that wholly owns the plaintiff) and other related companies.

[10] The claimed sum of RM7m is raised in the main suit although it is not entirely clear under and or in what context the same is raised therein. In fact, this court had earlier dismissed the defendant's application under encl 13 which sought for the present action to be transferred and consolidated with the main suit.

[11] In dismissing encl 13 with costs, this court found that the 'causes of action in both suits to be entirely different and as such the issues and arguments involved will be on different premises based on the respective facts and evidence'.

[12] On 22 January 2018, the plaintiff filed for summary judgment against the defendant but only for RM2.8m out of the RM7m claimed.

[13] The summary judgment application was dismissed by this court on 23 April 2018. The grounds for the dismissal of the application by the learned High Court judge are material to this application. Her Ladyship's reasons for the dismissal were:

(a) the remittance forms exhibited to show the sum of RM2.8m was remitted to the defendant do not state the purpose for the remittance;

(b) the payment vouchers produced do not show any acknowledgment by the defendant;

(c) a one-page general ledger reflecting a total sum of RM5m remitted in 2013 by the plaintiff as advance for the purchase of land does not contain any details or particulars of the land;

(d) the authenticity of the one-page general ledger requires determination;

(e) the sum of RM5m in the one-page ledger does not tally with the RM7m claimed;

(f) The items 'receivables, deposits and prepayment' appearing at p 8 of the 2013 and 2014 accounts lack details of the land;

(g) the documents produced claiming the RM7m was 'paid and received' by the defendant show instead that large portions of the RM7m were actually appropriated by one Chew, the deponent of the plaintiff's affidavit as well as by Tan Sri Dato' Kam Woon Wah and one person by the name of 'Tai'; and

(h) the defendant's averment that the sum of RM2.8m remitted to him was in fact monies due to him pursuant to an arrangement he made with his father, Tan Sri Dato' Kam Woon Wah.

[14] The plaintiff appealed to the Court of Appeal against the High Court judge's dismissal of the summary judgment application. The Court of Appeal upheld the dismissal on 14 November 2018.

[15] The action was then set down for trial on 15–19 July 2019.

[16] On 8 April 2019, the plaintiff filed the present application under

encl 67 to discontinue this action pursuant to O 21 r 3(1) of the Rules ('the discontinuance application'). A

REASONS FOR THE DISCONTINUANCE APPLICATION

[17] The plaintiff cited the non-joinder of parties as the reason for the discontinuance application. In para 4 of the affidavit filed by Chew Tee Beng ('Chew') in support of the application (encl 68), Chew stated that in respect of the claimed sum of RM7m — RM500,000 was remitted to one Raub Resources Sdn Bhd, a sum of RM4.1m was 'cashed out' and given to the defendant and the balance of RM2.4m was remitted to the defendant by way of telegraphic transfer. B C

[18] Chew averred that 'more time is required to trace the ultimate recipients of the sum of RM7m and to identify all parties to enable the plaintiff to pursue the recovery action'. He further stated that 'it is important for whoever received any part of the RM7m to be joined as a party in order for this honourable court to adjudicate upon the plaintiff's claim'. D

[19] Whilst the trial dates have been fixed, the parties have yet to exchange witness statements. However, the parties have filed the bundle of pleadings, the agreed issues to be tried, the agreed facts, the bundles of documents and their respective summary of case and list of witnesses. E

[20] Notwithstanding the aforesaid, the plaintiff contended that the present action is still at a preliminary stage as the defendant had indicated that he may amend his defence, depending on the outcome of certain appeals in the main suit. The defendant had also informed the court of a possibility of filing interlocutory applications including discovery. F

[21] The plaintiff submitted that the defendant has not gained any interim or interlocutory advantage between the issuance of the writ and the filing of the discontinuance application. The defendant is not barred from raising any defence to resist a subsequent suit by the plaintiff based on the same cause of action. On the other hand, if the discontinuance subject to the term without liberty to file afresh, the plaintiff will be shut out entirely of any remedy and will suffer a loss of RM7m. G H

THE DEFENDANT'S SUBMISSION

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[22] The defendant disputed the bona fide of the discontinuance application based on the ground of non-joinder of parties. The defendant asserted that the necessity to add other parties in fact runs counter to the plaintiff's pleaded claims based on breach of fiduciary duties and constructive

trust which are premised upon the defendant being the ultimate recipient of the RM7.

[23] The defendant submitted that if indeed there is a non-joinder of parties, the plaintiff could easily file an application to amend the writ to include the relevant recipients of the monies.

[24] According to the defendant, following the dismissal of the plaintiff's summary judgment application based on the issues raised by the defendant, the defendant is now *dominus litis* in the action. As such, the defendant contended that this court should refuse the plaintiff leave to discontinue the action. The defendant has exposed the flaws in the plaintiff's action.

[25] The defendant further contended that the discontinuance application is filed to avoid the plaintiff having to disclose the actual financial dealings of the plaintiff which will likely expose certain individuals to criminal prosecutions.

[26] If the court were to permit the discontinuance application, the defendant submitted that it should be on the term that the plaintiff be given no liberty to file afresh.

THE LAW ON DISCONTINUANCE OF ACTION UNDER O 21 R 3(1)

[27] In *Newlake Development Sdn Bhd v Zenith Delight Sdn Bhd* [2017] MLJU 671, the Court of Appeal declined to follow the Indian cases holding that it is not open to the court to grant leave to discontinue without liberty to file a fresh suit if an application that is made is one for a discontinuance with liberty to file a fresh suit. The Indian cases held that when the court has declined to grant leave to discontinue, the court ought to dismiss the application to discontinue *in toto*.

[28] Our Court of Appeal held that in an application under our O 21 r 3(1) of Rules, the court has wide discretion in granting an application to discontinue an action subject to terms that befit the facts and circumstances of the case. The relevant passage of the judgment states:

> [36] We are not in agreement with the decision of the abovementioned Indian cases in this respect, as we are not deplete of local authorities that have established that the courts generally has wide discretion in granting an application to discontinue an action subject to terms that befit the facts and circumstances of the case. Hence, even if the application by the plaintiff is for a discontinuance of the suit with liberty to file afresh, the court may very well be empowered to grant the discontinuance but with no liberty to file afresh. What is pertinent is the prejudice suffered by imposing such conditions to the plaintiff who is now left without remedy.

[29] Guided by this decision of the Court of Appeal, in determining the discontinuance application, I have the options of either: (a) dismissing the application for discontinuance *in toto*, thereby compelling the plaintiff to proceed with the action; or (b) granting the discontinuance but with liberty to file afresh, thereby permitting the plaintiff to subsequently file a new suit against the defendant; or (c) granting the discontinuance but without liberty to file afresh, thereby shutting the plaintiff entirely from making its claim based on the same cause of action against the defendant (whilst there can be other options eg granting leave to discontinue only in respect of certain parts of the claims, for the purposes of this case, the three options stated are the only relevant ones for consideration).

[30] The starting position must be that the court will not compel a plaintiff to continue his action against a defendant if he does not want to do so. In fact, under O 21 r 2(1), no leave of the court is needed for a plaintiff in an action begun by writ to discontinue the action as against the defendant at any time not later than 14 days after the service of the defence on him.

[31] Similarly, if all the parties to an action consent, the action may be withdrawn without leave of the court at any time before trial by producing to the court a written consent to the action being withdrawn duly signed by all the parties. This is provided for under O 21 r 2(4) of the Rules.

[32] Apart however from the aforesaid two instances, if a plaintiff wishes to discontinue an action against a defendant, leave from the court must be obtained. The justification for the need to obtain leave from the court is to safeguard the defendant.

[33] At the time when the plaintiff makes the application to discontinue his action against the defendant, the facts and circumstances may be such that some injustice may be caused to the defendant. How the court exercises its discretion in balancing the relative interests and rights of the plaintiff and the defendant must necessarily depend on the facts and circumstances of each case.

[34] As stated, the court has a wide discretion under O 21 r 3(1) of the Rules which stipulates that 'the Court hearing an application for the grant of such leave may order the action ... to be discontinued, or any particular claim made therein to be struck out, as against any or all the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just'.

[35] In the exercise of my discretion for the purposes of the discontinuance application, I have taken into consideration:

A (a) the reason(s) proffered by the plaintiff for the discontinuance application;

(b) the advantages, if any, that the defendant may have obtained at this stage of the proceedings; and

B (c) which of the three options will best serve the justice of the case.

The above considerations would encapsulate the five matters that the court must be satisfied before granting the order for discontinuance of an action as stated by the Court of Appeal in *Newlake Development Sdn Bhd v Zenith Delight Sdn Bhd* [2017] MLJU 671 which are:

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(a) if a defendant is *dominus litis*, the general rule is to refuse leave to discontinue;

D (b) whether the case is at an advanced stage; if so, care must be taken not to permit discontinuance. What constitutes an advanced stage depends on the facts and circumstances of the case;

(c) the plaintiff may have gained an interim interlocutory advantage between the date of issue of the writ and the point of time of the application to E discontinue;

(d) there is no miscarriage of justice occasioned by its refusal to permit the discontinuance; and

(e) it will not prejudice the opponent to the application or take away from F him any advantage to which he is fairly and reasonably entitled.

REASONS FOR DISCONTINUANCE APPLICATION

[36] Paragraph 4 of the Chew's affidavit (encl 68) states that the G discontinuance application is filed because of non-joinder of parties. It then discloses that out of the claimed sum of RM7m, only RM2.4m can be shown to have been directly remitted to the defendant. It implicitly concedes that the other parts of the RM7m could have been received by other parties. It states unequivocally that the plaintiff 'requires more time to trace the ultimate H recipients of the sum and to identify all relevant parties for it to properly pursue the recovery action'.

[37] This position is inconsistent with the averments made in the plaintiff's statement of claim where the plaintiff claimed that the entire RM7m had been I remitted to the defendant.

[38] It is apparent that the plaintiff is compelled to re-visit the sustainability of its claims as stated in the statement of claim after seeing the defendant's successful challenge to the plaintiff's summary judgment application in respect

of the sum of RM2.8m both at the High Court and at the Court of Appeal. Even the figure of RM2.8m claimed in the summary judgment application is inconsistent with the averment made by Chew in his affidavit that 'only RM2.4m can be shown to have been directly remitted to the defendant'.

[39] Also, by the plaintiff's averment that it requires 'more time to trace the ultimate recipients of the sum so as to be able to identify all relevant parties', has not the plaintiff conceded that the action, if it were to proceed to trial, the plaintiff will not be able to meet its claims against the defendant as pleaded in its statement of claim?

[40] The plaintiff is, in fact, seeking time to improve its claims and to gather further evidence to overcome the inadequacies that the defendant had successfully exposed when resisting the plaintiff's summary judgment application.

[41] This explains the reason why the plaintiff is not seeking to apply for the joinder of parties in this action which the plaintiff can do as the trial is still more than three months away at the time the discontinuance application was filed. The plaintiff is simply not ready at this stage with the necessary facts and evidence including the identities of the parties who are in receipt of the money claimed to make such an application.

[42] Given the aforesaid, the bona fide of the discontinuance application is questionable. The non-joinder of parties is a convenient notice pasted at the front door to enable the plaintiff to escape by the side door so as to avoid a direct confrontation with the defendant.

ADVANTAGES GAINED BY THE DEFENDANT

[43] Against the general principle that a plaintiff should not be compelled to litigate against his will is the opposing need to ensure that a defendant is not deprived of some advantage which he has already gained in the litigation and that adequate protection is granted to ensure that the advantage he has gained is preserved.

[44] In the instant case, the defendant has demonstrated that the plaintiff is no longer wholly *dominus litis*. In the plaintiff's summary judgment application, the defendant had shown that he had a good response to each of the plaintiff's allegations. The defendant had exposed the plaintiff's lack of evidential support for the allegations made in the plaintiff's statement of claim.

[45] For the plaintiff to proceed to trial with the current state of evidence, to succeed is an uphill task. The plaintiff therefore hopes to be given the

A opportunity to improve on the probability of succeeding in his claims against the defendant by the discontinuance of this action, thereby giving him more time to make further investigations for his claims. In short, the plaintiff is seeking to avoid the contest with the defendant for the moment, seeking the discontinuance as an escape from the battle and to re-launch after improving its
B position.

[46] To permit the plaintiff to do so would be to deprive the defendant of the advantage gained. The defendant, being now *dominus litis*, is entitled to insist on proceeding with the action, given that the pleadings have closed and the
C documents necessary for the trial save for the witnesses' statements have been filed in court.

[47] Counsel of the plaintiff alluded that the defendant had previously
D indicated to the court of the possibility of amending its defence and its intention to file a discovery application. These have not been done. In my mind, this does not in any way suggest that the action is still at a preliminary stage. The fact remains that the trial dates have been fixed. There is nothing to suggest that the dates will be vacated.

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[48] As to the submission that the defendant is not barred from raising any defence to resist a subsequent suit by the plaintiff based on the same causes of action raised in this action, this is not true. If the plaintiff is permitted to re-file the action after tracing and identifying the ultimate recipients of the whole
F RM7m, would this not mean that the defendant will be deprived of the very defences that are now available to him?

BEST OPTION TO SERVE THE JUSTICE OF THE CASE

G **[49]** Given the aforesaid, should the plaintiff be permitted to discontinue the action with liberty to file afresh? Generally, the court will grant leave to discontinue with liberty to the plaintiff to file a subsequent action against the defendant based on the same cause of action as the discontinued action save where the defendant is able to satisfy the court that there is exceptional ground
H (see *Sigma Glove Industries Sdn Bhd & Ors v Ong Chin Kok & Anor* [2018] 8 MLJ 481).

[50] In *Newlake Development Sdh Bhd v Zenith Delight Sdn Bhd*, the Court of Appeal allowed the plaintiff to discontinue the action *with* liberty to file
I afresh as the Court of Appeal found that the prejudice of shutting the plaintiff entirely of any remedy available to him for the loss of his monies given the serious allegations of impropriety against the defendants far outweighs the prejudice to the defendant of having to face a similar suit if liberty to file afresh was allowed.

[51] The plaintiff had sought for the discontinuance of the action as its newly appointed counsel had only five days before the given deadline to file the witness statements with the trial of the action to commence in three weeks from his appointment. There was little done by the previous solicitors of the plaintiff. The trial was expected to be complex with the plaintiff having 14 witnesses, eight of whom were subpoenaed witnesses.

[52] It is pertinent that the Court of Appeal had found that the defendants had not shown that they were deprived of any advantage which they had already gained in the litigation.

[53] Contrast the facts in *Ng Hee Thong & Anor v Public Bank Bhd* [2000] 2 MLJ 29 where the Court of Appeal had reversed in part the High Court's decision granting a discontinuance with liberty to file afresh. The Court of Appeal granted leave to discontinue but on terms that no fresh action should be brought on the same cause of action based on the same or substantially the same factual situation.

[54] In *Ng Hee Thong & Anor v Public Bank*, the defendant had a good defence. The notice of demand which was a prerequisite to the claim against him as a guarantor was not properly issued. The defendant had successfully defended the bank's summary judgment application on this ground before the Court of Appeal. However instead of proceeding with full trial, the bank applied to discontinue the action with liberty to file afresh.

[55] The Court of Appeal granted the bank's application to discontinue but with no liberty to file afresh. NH Chan JCA opined that the defendant would be deprived of a good defence that was available to him if the bank were to be permitted to file afresh the claim with a fresh and proper notice of demand.

[56] Yet a different result was taken by Raja Azlan Shah J (as he then was) in *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124.

[57] The applicant had filed an originating summons for an order that a land secured for the repayment of a loan be sold by public auction under the National Land Code. In his affidavit opposing the order for sale, the respondent highlighted that: (1) the memorandum of agreement for the loan did not comply with s 16 of the Moneylenders Ordinance 1951 in that the date of the loan was not correctly stated and the terms of the loan were not correctly set out; (2) that the charge was void because the executor cum trustee did not have the power either under the will or the Trustee Ordinance 1949 to charge the land; and (3) the notice of default was wrong and ineffective. It should have been in Form 16E and not Form 16D as issued by the applicant.

[58] After receiving the respondent's affidavit, the applicant sought to discontinue the action on the ground that even if the court were to grant an order for sale, the applicant would have difficulty in selling the property.

[59] The respondent opposed the discontinuance alleging that the applicant knowing that it could not get the order for sale was trying to get an illegal charge by discontinuing the action.

[60] In exercising his discretion to disallow the discontinuance, Raja Azlan Shah J (as he then was) held:

> If the applicant here is *dominus litis* then leave to discontinue may be granted. If he is not, then it is unlikely that I would grant him leave to discontinue. I do not think that the applicant is wholly *dominus litis.* He cannot dispose of the case as he thinks fit or allow it to be dismissed or let judgment go by default. The parties have come to a stage where the respondent/chargor has gained an upper hand by an advantage in that he could find flaws in the applicant/chargee's allegations namely the wrong dates in the memorandum, etc and the fact that the reason for wanting a discontinuance is not a very strong one. The respondent/charger is not to be deprived of these advantages which have made him a well-matched adversary in the arena.'

[61] In both *Ng Hee Thong & Anor v Public Bank Bhd* and *Overseas Union Finance Ltd v Lim Joo Chong*, the court had found that the defendant had become *dominus litis* in the action. In both cases, the facts showed that the defendant had established a good defence to the plaintiff's claim and that it would be prejudicial to the defendant if the plaintiff were to be granted leave to discontinue with liberty to file afresh.

[62] The facts in the present case are not dissimilar to these two cases in that the defendant has demonstrated that he is equal to the challenge initiated by the plaintiff in the action and has proven to be 'a well-matched adversary in the arena'.

[63] In deciding between dismissing the plaintiff's discontinuance application and granting the discontinuance but on terms that the plaintiff is not at liberty to file afresh, I took into consideration the fact that the court would not compel a litigant to press on with his action against his will. More so in the present case since the plaintiff has averred that it cannot proceed with its claims in the present form based on the evidence that is currently available. The trial will be futile as there are other relevant parties that needed to be joined for the recovery of its claims.

[64] To compel the plaintiff to proceed with the trial will also result in the parties having to incur additional time, expenses and costs to prepare for the

same. The parties, especially the defendant, should be spared of such trouble and financial strain.

[65] However, it will be prejudicial to the defendant if the plaintiff were to be permitted to discontinue the action with liberty to file afresh. The advantage that the defendant has gained will be taken away from him if the plaintiff is given a life line to overcome the deficiencies in its claims in the present action.

[66] In the premises and on the exceptional grounds set out above, I exercise my discretion to grant the plaintiff's application for leave to discontinue this action but on terms that no fresh action shall be brought on the same cause of action against the defendant based on the same or substantially the same facts in this action.

[67] The plaintiff is ordered to pay the defendant a sum of RM20,000 towards costs of this application and the action.

[68] The trial dates fixed on 15–19 July 2019 are hereby vacated.

Plaintiff's application to discontinue action allowed without liberty to file afresh; and RM20,000 in costs.

Reported by Izzat Fauzan